

General Information Letter: Withholding from compensation of a nonresident is required only if the compensation is "paid in this State" under IITA Section 304(a)(2)(B).

May 24, 2007

Dear:

This is in response to your letter dated May 9, 2007 in which you request information regarding Illinois income tax withholding requirements. The nature of your request and the information you have provided require that we respond with a General Information Letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department, See 86 Ill. Adm. Code 1200.120(b) and (c), which may be found on the Department's website at www.revenue.state.il.us.

In your letter you have stated the following:

I was employed by my Chicago headquartered employer in 2006. I am a resident of STATE working in the company's STATE office and on salary. My employer asked that I work from the company's corporate headquarters for two weeks per month for the "indefinite" and "foreseeable" future. My employer is not in the aircraft or vessel building industry and is a service provider. My direction and supervision is from the Chicago office while I am in Chicago and while I am in STATE.

In this circumstance, was my employer required to withhold Illinois state income taxes from my paycheck? Under what basis would my employer be (not be) required to do so such that an audit by the State of Illinois Department of Revenue would deem my employer to be in compliance with state laws?

RULING

Section 701 of the Illinois Income Tax Act ("the IITA"; 35 ILCS 5/701) sets forth the requirements relating to an employer's withholding of Illinois income tax. Subsections (a) and (b) of that section state as follows:

- (a) In General. Every employer maintaining an office or transacting business within this State and required under the provisions of the Internal Revenue Code to withhold a tax on:
 - (1) compensation paid in this State (as determined under Section 304(a)(2)(B)) to an individual; or
 - (2) payments described in subsection (b) shall deduct and withhold from such compensation for each payroll period (as defined in Section 3401 of the Internal Revenue Code) an amount equal to the amount by which such individual's compensation exceeds the proportionate part of this withholding exemption (computed as provided in Section 702) attributable to the payroll period for which such compensation is payable multiplied by a percentage equal to the percentage tax rate for individuals provided in subsection (b) of Section 201.
- (b) Payment to Residents. Any payment (including compensation) to a resident by a payor maintaining an office or transacting business within this State and on which withholding of tax is required under the provisions of the Internal Revenue Code shall be deemed to be

compensation paid in this State by an employer to an employee for the purposes of Article 7 and Section 601(b)(1) to the extent such payment is included in the recipient's base income and not subjected to withholding by another state.

Department of Revenue Regulations section 100.7010(a)(1) provides that if withholding is required under the above rules, then the entire amount of such compensation is subject to withholding.

Pursuant to IITA section 304(a)(2)(B), "compensation paid in this State" means compensation with respect to which:

- (1) The individual's service is localized in Illinois because it is performed entirely within Illinois;
- (2) The individual's service is localized in Illinois although it is performed both within and without Illinois, because the service performed without Illinois is incidental to the individual's service performed within Illinois; or
- (3) The individual's service is not localized in any state but some of the service is performed within Illinois and either; the base of operations, or if there is not a base of operations, the place from which the service is directed or controlled is within Illinois, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in Illinois.

In applying IITA section 304(a)(2)(B), Department Regulations section 100.7010(a)(3) states that rules set forth therein "are to be applied in such manner that, if they were in effect in other states, an item of compensation would constitute 'compensation paid in' only one state. Thus, if an item would, under these rules, constitute compensation paid in a state other than Illinois because the individual's service was localized in such other state under the tests of [section 302(a)(2)(B)(1)] above, it could not also be compensation paid in Illinois."

Department Regulations section 100.7010(c) states as follows regarding whether an individual's service is localized in Illinois for purposes of section 304(a)(2)(B):

In determining whether an individual's service performed without this State is incidental to his service performed within this State ..., the term "incidental" means any service which is necessary to or supportive of the primary service performed by the employee or which is temporary or transitory in nature or consists of isolated transactions. The incidental service referred to above may or may not be similar to the individual's normal occupation so long as it is performed within the same employer-employee relationship. That is, an individual who normally performs all of his service in this State may be sent by his employer to another state to perform service which is totally different in nature from his usual work or he may be sent to do similar work. So long as such service is temporary or consists merely of isolated transactions, it will be considered to be incidental to his service performed within this State, and his entire compensation will be subject to withholding.

Regulations section 100.7010(d)(1) states:

The localization tests are not applicable where an individual's employment normally or continually includes service within this State and also services without the State which are not

“incidental” to the services performed within this State. In such case, if the individual’s base of operations is within this State, his entire compensation will be subject to withholding, but if his base of operations is without this State, none of his compensation will be subject to withholding.

In this case, you have indicated that you perform services for your employer both in Illinois and in STATE. In addition, your letter states that the services performed in Illinois, consisting of two weeks per month, are to be continued for the indefinite and foreseeable future. Accordingly, it does not appear that your services are localized either in Illinois or STATE. As a result, your compensation would be subject to Illinois income tax withholding if your base of operations is in Illinois. If your base of operations is in STATE, then none of your compensation is subject to Illinois withholding.

Department Regulations section 100.7010(d)(2) describes the term “base of operations” as follows:

The term “base of operations” refers to the place or fixed center from which the individual works. An individual’s base of operations may be his business office (which may be maintained in his home), or his contract of employment may specify a place at which the employee is to receive his directions and instructions. In the absence of more controlling factors, an individual’s base of operations may be the place to which he has his business mail, supplies, and equipment sent or the place where he maintains his business records.

Your letter does not contain sufficient information upon which to suggest a determination as to whether or not you have a base of operations. The regulations provide examples at section 100.7010(d)(3) which illustrate the determination of base of operations. If, however, it is determined that you do not have a base of operations, then your compensation will be subject to Illinois income tax withholding if your service is directed or controlled from Illinois. Regulations section 100.7010(e) states:

The permanent place from which the employee’s service is directed or controlled is relevant in determining whether wages are subject to withholding if the localization tests are not applicable and it is impossible to determine the base of operation for such individual. In such a case, if both the place from which the individual’s service is directed or controlled is within this State, and some of the service is performed within this State, then his entire compensation will be subject to withholding, but if not, none of his compensation will be subject to withholding. For example, a salesman’s territory may be so indefinite and so widespread that he will not retain any fixed business office or address but will receive his orders or instructions by mail or wire wherever he may happen to be. In such case, the location of the permanent place from which direction and control is exercised must be determined.

In this case, you have indicated that your services in both Illinois and STATE are directed and controlled from the employer’s Chicago office. Therefore, because your service is not localized in any state, and assuming no base of operations may be determined, your compensation would be subject to Illinois withholding on the basis that your services are directed and controlled in Illinois.

As stated above, this is a GIL which does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items one through eight of 86 Ill. Adm. Code 1200.110(b). If you have additional

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questions regarding this GIL, you may contact me at (217) 782-7055.

Sincerely,

Brian L. Stocker
Staff Attorney (Income Tax)